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WESLEY NEWCOMB HOHFELD—TEACHER

When a master-craftsman has laid down his tools for the last time, there falls upon those who have worked with him and under him a heavy loss—a loss too heavy to be realized at once. With increasing realization comes a need for expression, for some tribute, however inadequate, to the memory and to the work of the master who is gone. To that end this number of the JOURNAL has been given: to some presentation of Professor Hohfeld's contributions to the working science of the law, to some development of his analytical methods in their practical application, to some study of the evolution of that Law to which he devoted his life, to some indication of the problems which confront us to-day in carrying on the work which lay closest to his heart: accurate, adequate adaptation of our law to the changing needs of this society in which and for which it exists.[1]

Something has been written in these pages of Professor Hohfeld as a scholar, and as a writer. But it does not seem fitting that a number

[1] The JOURNAL here expresses its regret that continued ill health has as yet prevented Professor Morris R. Cohen, of the College of the City of New York, from completing the study on *The Philosophy of Legal Method* which he had planned to publish in this number in commemoration of his friend.

such as this, edited by men who were his colleagues or his students, should be without some appreciation of his work as a teacher of the law.

He was no common teacher. *"A man for the upper third"*—quite so—sincerely, frankly so. Each man must do his work in that way in which he best can do that work. "Hoh" taught the upper third—and he *taught* them.

He had little of that grace in putting forth his thoughts—or meeting men—which makes for general popularity, for quick, unthinking so-called comprehension. His approach was neither light nor facile. Perforce his appeal was largely limited to those who by temperament and training could and would see something of the full depth of his learning and the power of his mind.

And to them he did appeal. Under him one was led step by step, with sure solemnity, into the presence of the Law, in all the majesty of its great system; the Law—a growing, constantly adjusting whole—inconsistent, it may be, as mankind is inconsistent, yet ever glorious in freeing itself from inconsistencies. To have the vision lifted beyond the little point at hand, out of the single "field" staked off as "Bills and Notes" or "Equity"—carried up into the high places, to look out over the whole land, hills and valleys, ploughed land and fallow, spread out in its wonder—this was the inspiration to be had in Hohfeld's classes. It was to be had in all his classes, to be had increasingly from year to year, as one's own eyes were opened, one's perception schooled. But most of all did it await "Hoh's" students in the Conflict of Laws. There, amid the conflicting claims of varied jurisdictions, the nature of the Law grew clear—to him, to us—; there, out of chaos came perspective; there, and there only, it has seemed to me, could a man see Hohfeld's mind trace out again the path of his own deepest thinking. There, working over what was, for sound theory, practically uncharted ground, he fought his way out of the inconsistencies of current doctrine, seeking the explanation which explained; and found it—doubted, examined it—tested, tried, and fortified it, till it *stood,* four-square, complete. There—still unwritten—was his greatest single individual contribution; still unwritten—but given to his students. And it was amid the conflict of the laws that he worked out in their completeness the massive outlines of his jurisprudence. It was in that crucible of conflict that his fundamental concepts took their final shape; only when tested there do they dawn in all their import upon the mind. Hohfeld—teacher! There was the triumph of his teaching.

And so it was he led us up on to the height. Much—so dishearteningly much—was, even at the last, too vast, too far, too unfamiliar to be grasped in its detail; but the height, once gained, the vision, once seen, was not to be forgotten.

It was no easy climbing. "Hoh" was no believer in the royal road. He had scant sympathy for mental laziness or physical, for scattered

energies or surface-thought, for what he used to call the small and common coin of legal learning. But for any who came seeking, keen-eyed and earnest, he was a willing guide. And as an opponent in discussion he was in some ways generous to a fault. Let a man object, let a man fight the conclusion, let a man bend his every energy to the attack—"Hoh" grudged him, in class-room or office, neither time nor labor nor occasion.

Such teaching bore its fruit. Some students, as we have come to know since Hohfeld's death, he filled with reverence such as few men dream even of inspiring. And ever increasing comes testimony from his students of the value of his rigorous training: value in practice—value in their thinking and their doing.[2]

His teaching bore its fruit. The "upper third" is not the whole. That there should be in his classes those who did not, could not—and some, indeed, good men, who would not—understand: this was to be expected. It was to be expected that these men should not love him. And with his sickness creeping on him, Professor Hohfeld grew at times impatient of ununderstanding, carried over at times into class-room intercourse the discipline to which in his own mental work he had so drilled himself. And that grace which makes such things pass off as nothings, the gift we call a *way* with men, he did not have.

He was a lonely man—perhaps for lack of that same *way* with people. Perhaps, too, we owe much to that loneliness, much of his depth, much of the huge breadth of the foundations of his thought. Night after night it took him back to the office, in which he had worked through all the day, to work again, read, think, amidst a tangle of books and papers, long past the hour of closing. It is hard to recall a night when, looking out as my day closed, I did not find his office window bright.

But welcome as a student was who came into his office, it is not in his

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[2] Hohfeld's method, Hohfeld's faith, and much of Hohfeld's personality speak in the following lines from the close of his first paper on *Fundamental Legal Conceptions*: " . . . It might be difficult at first glance to discover any essential and fundamental similarity between conditional sales of personalty, escrow transactions, option agreements, agency relations, powers of appointment, etc. But if all these relations are reduced to their lowest generic terms, the conceptions of legal power and legal liability are seen to be dominantly, though not exclusively, applicable throughout the series. *By such a process it becomes possible not only to discover essential similarities and illuminating analogies in the midst of what appears superficially to be infinite and hopeless variety, but also to discern common principles of justice and policy underlying the various jural problems involved.* . . . An indirect, *but very practical,* consequence is that it frequently becomes feasible, by virtue of such analysis, to use as persuasive authorities judicial precedents that might otherwise seem altogether irrelevant. . . . *In short, the deeper the analysis, the greater becomes one's perception of fundamental unity and harmony in the law.*" (1913) 23 YALE LAW JOURNAL, 59. The italics are the present writer's.

office that one's memory pictures "Hoh"; but in his class-room, there behind the desk—in his class-room when some man had interposed a question. There he sits, crouched somewhat forward on the desk; his black-haired eagle-face seems set with anticipation of the clash of views, his heavy shoulders tense, for all their student's stoop,—there he sits, silent through several seconds. You too grow tense for the struggle; but as you watch his eyes, you thrill with a dawning wonder, almost awe—slowly, alone, you see him climbing up into the mountain, to see this little question set out against the background of the whole, to look again upon the body of the Law as one,—and signal down to you the way to join him.

K. N. L.

BUILDERS' BONDS AND MATERIALMEN

In cases where a building contractor gives to the owner and obligee a surety bond securing the performance of the builder's contract and protecting the owner against the liens of laborers and materialmen, there is a good deal of apparent conflict as to whether or not the laborers and materialmen are beneficiaries of the contract and can maintain suit against the bondsmen for sums due them from the contractor. If they can sue at all, it is clear that they must sue as third-party beneficiaries of a contract to which they themselves are not parties. The question, on which the seeming conflict exists, is as to whether or not they are in fact third-party beneficiaries.

In the recent case of *Forburger Stone Co. v. Lion Bonding & Surety Co.* (1919, Neb.) 170 N. W. 897, the question was decided in favor of the materialman, three judges dissenting. The facts seem to be that the defendant surety company bound itself to the owner and obligee to see that the building contractor should perform all of his duties to the owner, one of these duties being that he should pay all claims for labor and material. It was expressly provided in the bond that the surety should be notified of any act on the part of the principal that might involve loss to the surety, immediately upon knowledge of such an act coming to the owner or his supervising architect. No notice of this sort was ever given to the surety, and yet the court held that the materialman could maintain suit.

The rule that a third-party beneficiary can enforce a contract made for his benefit is too well established to need reaffirmation.[1] This is true whether the third party is a donee[2] or is a creditor of the promisee.[3]

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[1] See Corbin, *Contracts for the Benefit of Third Persons* (1918) 27 YALE LAW JOURNAL, 1008.

[2] *Seaver v. Ransom* (1918) 224 N. Y. 233, 120 N. E. 639; *In re Edmundson's Estate* (1918) 259 Pa. 429, 103 Atl. 277.

[3] *Lawrence v. Fox* (1859) 20 N. Y. 268.